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CHARLES ELMORE CROPLEY

Supreme Court of the United States.

OCTOBER TERM, 1930.

No. 400

MASCOT OIL COMPANY, INC., PETITIONER,

v.

THE UNITED STATES, RESPONDENT.

Brief for Petitioner.

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(35,322)

INDEX

	PAGE
Statement of the case	1
Opinion below	2
Jurisdiction	2
Statement of facts	2
Statutes involved	3
Specification of errors	5
Questions presented	7
The argument	8
Summary of Argument	8
A. The "liability for the tax" did not "still" exist, after the expiration of the statutory period for collection to defeat the right of the petitioner to recover the tax paid after the statute had run	10
B. The deposit with the bank was made merely to insure the collection of the amount of the tax after the expiration of the period within which the collection legally could have been made, but which later colection the petitioner could not have resisted	11
C. The petitioner gave no bond before the expiration of the statutory period for collection and there is no similarity between this case and that of United States *v.* John Barth Company	13
D. The letter from the bank to the collector does not constitute a waiver of the right of the petitioner to recover the amount of the tax collected from it after the expiration of the statute of limitations, because not a consent in writing of both the petitioner and the Commissioner of Internal Revenue as required by Section 250(d) of the Revenue Act of 1921	18
E. The waiver was given after the expiration of the statutory period for collection and is therefore of no force and effect	19

F. The waiver is of the limitation period defined in Section 278(d) of the Revenue Act of 1924 and has no application to the collection of the tax assessed in July, 1920 21
G. The waiver is not sufficient to meet the requirements of Section 250(d) of the Revenue Act of 1921 because not a consent to a "later determination, assessment, and collection of the tax" 23
H. The provisions of Section 611 of the Revenue Act of 1928, do not apply 26
I. To the extent that it might otherwise be construed to apply Section 611 has been repealed by Section 3220 of the Revised Statutes, a later act 38
J. Section 611 of the Revenue Act of 1928, if construed to apply to this case, in which the tax was collected after the enactment of 1106(a) of the Revenue Act of 1926, would deprive the petitioner of its property without due process of law in violation of the Fifth Amendment 41
K. It was beyond the power of a subsequent Congress in the enactment of Section 612 of the Revenue Act of 1928, to repeal Section 1106(a) as of February 26, 1926, to disturb the petitioner's right to recover a tax paid after the liability therefor had been extinguished by the bar of the statute of limitations 42
Conclusion 45
Appendix 48

CASES CITED

American Glue Company *v.* United States, S. Ct. No. 519, October Term, 1930 37
Bowers *v.* New York & Albany Lighterage Company, 273 U. S. 346, 47 S. Ct. 389 ..... 11, 12, 25
Clinton Iron & Steel Company *v.* Heiner, 30 F. (2d) 542 ..... 29, 34
Conant *v.* Kinney, 162 Fed. 581, aff'd 166 Fed. 720, certiorari denied 214 U. S. 526, 29 S. Ct. 703 28

Crooks *v.* Harrelson, et al, 35 F. (2d) 416 34
De Lima *v.* Bidwell, 182 U. S. 199 45
Diamond Alkali Company *v.* Heiner, 39 F. (2d) 643 ..... 33, 44
Dobbins, *v.* Commissioner, 31 F. (2d) 935 43
Frerichs *v.* United States, 21 Ct. Cl. 16, aff'd 124 U. S. 315 .. 29
Graham *v.* Dupont, 262 U. S. 234, 43 S. Ct. 567 ..... 11, 12
Graham *v.* Goodcell, 35 F. (2d) 586, certiorari granted, No. 36, October Term, 1930 ..... 28, 39
Huntley *v.* Gile & Jenks, etc., 32 F. (2d) 857 39
Joy Floral Company *v.* Commissioner, 29 F. (2d) 865 19
Lucas, Commissioner *v.* The Pilliod Lumber Company, 281 U. S. 245, 50 S. Ct. 297 25
Magee, Percival E. *v.* United States, S. Ct. No. 65, October Term, 1930 ..... 10, 20, 26, 36, 38
Oak Worsted Mills *v.* United States, S. Ct. No. 104, October Term, 1930 36
Peerless Woolen Mills *v.* Commissioner, 13 B. T. A. 1119 ... 44
Pepsin Syrup Company *v.* Schwaner, 35 F. (2d) 197 44
Pictorial Printing Company *v.* Commissioner, 38 F. (2d) 563 20
Reeves, Daniel, Inc. *v.* Anderson, decided July 21, 1930, Circuit Court of Appeals, Second Circuit, certiorari granted, No. 463, October Term, 1930 ..... 28, 39, 40
Rock Island A. & L. R. R. Company *v.* United States, 254 U. S. 141, 41 S. Ct. 55 25
Russell *v.* United States, 278 U. S. 181, 49 S. Ct. 121 ..... 11, 19, 21, 36, 42
Sage *v.* United States, 250 U. S. 33, 39 S. Ct. 415 28
Smietanka *v.* Indiana Steel Co., 257 U. S. 1, 42 S. Ct. 1 28
Stange *v.* United States, S. Ct. No. 23, October Term, 1930 .. 19, 24
Taubel, William F. Inc. *v.* Sturges, D. Ct. New Jersey, decided November 8, 1930 35
Toxaway Mills *v.* United States, 61 Ct. Cl. 363, reversed 273 U. S. 781, 47 S. Ct. 471 ..... 10, 11, 42
Utermehle *v.* Norment, 197 U. S. 40, 56, 25 S. Ct. 291 23
United States *v.* John Barth Company, 27 F. (2d) 782, reversed on other grounds, 279 U. S. 370, 49 S. Ct. 366 ..... 5, 8, 13, 14, 15, 16, 17, 44

United States *v.* Burden, Smith & Company, 35 F. (2d) 229 34
United States *v.* Merriam, 263 U. S. 179, 44 S. Ct. 69 24
United States *v.* Updike, 281 U. S. 489, 50 S. Ct. 367 25
United States *v.* Wyman, Partridge & Company, S. Ct. No. 416, October Term, 1930 12, 34
Wettengel *v.* Robinson, et al, 300 Pa. 255, 150 Atl. 658 33, 44
Wright and Taylor, Inc. *v.* Lucas, decided November 10, 1930, Circuit Court Appeals, Sixth Circuit 39, 40
Wyman, Partridge & Company *v.* United States, 41 F. (2d) 886 33, 44

STATUTES CITED.

Act of May 29, 1928, c. 901, Sec. 3, 45 Stat 996 4, 38, 40
Judicial Code, Section 145 9, 26, 27, 30, 48
United States Code Annotated, Pamphlet Supplement Cumulative, Acts of 70th Congress, First Session, with annotations to July 1, 1928 38
United States Code, Supplement III, Title 26, Sec. 149 38
Revised Statutes,
Section 3220, 45 Stat. 996 3, 4, 14, 27, 29, 38, 40, 41
Section 3226, 44 Stat. 116 3, 4, 14, 27, 48
Revenue Act of 1918,
Section 234(a), 40 Stat. 1057 16, 17
Revenue Act of 1921,
Section 250(d), 42 Stat 227, 265 1, 3, 10, 13, 16, 18, 19, 21, 23, 24, 42
Revenue Act of 1924,
Section 278(d), 43 Stat. 299 2, 3, 21, 22, 36
Revenue Act of 1926,
Section 1106(a), 44 Stat. 113 3, 4, 10, 13, 33, 41, 42, 44
Revenue Act of 1928,
Section 607, 45 Stat. 874 3, 4, 26, 27
Section 611, 45 Stat. 791, 875 2, 3, 4, 13, 26, 27, 33, 34, 38, 40, 41
Section 612, 45 Stat. 875 3, 4, 27, 41, 43, 44
Section 619(b), 45 Stat. 878 29, 30, 38, 39, 40, 41

CONGRESSIONAL REPORTS.

House Report, No. 356, 69th Congress, First Session 42
House Report, No. 2, 70th Congress 31
Senate Report, No. 960, 70th Congress, First Session 31

TREASURY DEPARTMENT REGULATIONS.

Regulations 33, Article 261 36
Regulations 62, Article 1032 36
Regulations 65, Article 1272 ..... 22, 36
Regulations 69, Article 1351 ..... 31, 48
Regulations 74 38

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1930.

No. 400.

MASCOT OIL COMPANY, INC., PETITIONER,

v.

THE UNITED STATES.

BRIEF FOR PETITIONER.

STATEMENT OF THE CASE.

This is a suit brought by the petitioner in the Court of Claims to recover $28,846.64, additional income and profits taxes for the calendar year 1918, collected after the expiration of the five-year period for collection prescribed by Section 250(d) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 265. To the petitioner's cause of action the respondent relied on the fact that after the expiration of the five-year period the petitioner made a deposit with its bank to insure the payment of the tax and on the fact that after the expiration of the five-year period prescribed in Section 250(d) of the Revenue Act of 1921 the petitioner and the Commis-

sioner of Internal Revenue entered into a consent in writing as provided in Section 278(d) of the Revenue Act of 1924, c. 234, 43 Stat. 299. The respondent also relied on Section 611 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 875, and the Court of Claims held (Rec. 11 et seq.) that the petitioner is not entitled to recover because the deposit was made and the waiver was given, 42 F. (2d) 309.

This Court granted a writ of certiorari October 27, 1930, to review the decision of the court below.

Unless otherwise indicated the italics of this brief are those of the petitioner.

I.

Opinion of the Court Below.

The opinion of the court below was rendered by the Court of Claims on June 2, 1930. The opinion has been reported in 42 F. (2d) 309 and is a part of the record on this appeal (R. 13-16).

II.

Jurisdiction.

This Court has heretofore granted a writ of certiorari under the provisions of Section 3(b) of the Act of February 13, 1925 (45 Stat. 936).

The date of the judgment of the Court of Claims sought to be reversed is June 2, 1930 (R. 16). The petition applying for the writ of certiorari was filed August 27, 1930, and was granted October 27, 1930.

III.

Statement of the Facts.

The petitioner filed its return for the calendar year 1918 during the month of August, 1919, and filed a claim in abate-

ment during the month of December, 1919. During the month of July, 1920, the Commissioner of Internal Revenue assessed an additional tax and in August, 1920, the petitioner filed a second claim in abatement (R. 11).

On September 19, 1925, the petitioner deposited with its bank $65,000.00 and the bank on October 10, 1925, advised the collector that the amount had been deposited and that the bank was authorized to pay the collector up to this amount.

On the following day the petitioner and the Commissioner signed an income and profits tax waiver whereby the petitioner waived the time within which distraint or a proceeding in court might be begun for the collection of the tax, as provided in Section 278(d) of the existing Revenue Act.

On May 28, 1926, the collector made demand on petitioner for the sum of $28,846.64, representing the unpaid balance of the said assessment of additional tax, which the petitioner paid to the collector under protest June 8, 1926. Payment was not made by the bank from the deposit. On receipt of payment from the petitioner the collector withdrew all claim to the deposit.

IV.

Statutes Involved.

The statutes here involved are Section 250(d) of the Revenue Act of 1921 (42 Stat. 227, 265, 266); Section 1106(a) of the Revenue Act of 1926 (44 Stat. 113); Sections 607 (45 Stat. 874), 611 and 612 (45 Stat. 875) of the Revenue Act of 1928 and Sections 3220 (c. 901, 45 Stat. 996) and 3226 (44 Stat. 116) of the Revised Statutes, as amended.

Section 250(d) of the Revenue Act of 1921 (42 Stat. 227, 265, 266) as applicable here reads in part as follows:

> "The amount of income, excess-profits, or war-profits taxes due under any return * * * shall be

> determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes * * * shall be begun, after the expiration of five years after the date when such return was filed. * * *"

Sections 1106(a) of the Revenue Act of 1926, and Sections 607, 611 and 612 of the Revenue Act of 1928, are printed in the petition (R. 3).

Section 3220 of the Revised Statutes, as amended and reenacted by the Act of May 29, 1928, Sec. 3, c. 901, 45 Stat. 996, reads as follows:

> "Sec. 3. Section 3220, Revised Statutes (title 26, section 149, page 737, United States Code), as amended, is amended to read as follows:
>
> 'REFUNDMENTS: TAXES AND PENALTIES—The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal-revenue taxes collected by him with the cost and expense of suit; also all damages and cost recovered against any assessor, assistant assessor, collector, agent or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress, by internal-revenue districts and alphabetically arranged of all refunds in ercess of $500, at the beginning of each regular session of Congress of all transactions under this section.' Approved, May 29, 1928."

Section 3226 of the Revised Statutes as amended, is printed in the petition (R. 3-4).

V.

Specification of Errors.

The errors which the petitioner urges as grounds for the granting of the writ of certiorari and for the reversal of the decision of the Court of Claims are:

1. The court below erred in holding as a matter of law that "the liability for the tax still existed" after the expiration of the statutory period in which the tax legally could be collected.

2. The court below erred in holding that the petitioner is not entitled to recover a tax paid after the running of the statute of limitations against the United States, because the petitioner, after the running of the statute, made a deposit with its bank to insure payment on demand by the collector.

3. The court below erred in holding that the deposit so made was equivalent to a bond given during the statutory period and as a substitute for the liability for the tax and further erred in holding that for such reason the decision of this Court in the case of *United States* v. *John Barth Company*, 279 U. S. 370, 49 S. Ct. 366, should be followed.

4. The court below erred in holding that the letter from the petitioner's bank to the collector is a contract and that the collection was based on a valid contract and not on the ground that a tax was due.

5. The court below erred in not holding that the deposit was made merely to insure payment on demand by the collector, which the petitioner could not refuse, and that it had no effect on the statute of limitations and did not create a new cause of action.

6. The court below erred in not holding, in accordance with its special findings of fact, that payment was not made by the bank from the deposit, nor was it made on the basis of the letter from the bank, but was made by the petitioner on demand by the collector.

7. The court below erred in not holding that a waiver of

the time for collection obtained from the petitioner after the expiration of the five-year period defined in Section 250(d) of the Revenue Act of 1921 is invalid and of no effect.

8. The court below erred in holding that a waiver in which Section 278(d) of the Revenue Act of 1924 is referred to and is incorporated should be construed to extend the period defined in Section 250(d) of the Revenue Act of 1921.

9. The court below erred in not holding that the waiver does not meet the requirements of Section 250(d) of the Revenue Act of 1921 that the Commissioner and the taxpayer consent to a later "determination, assessment, and collection of the tax."

10. The court below erred in not holding that the provisions of Section 611 of the Revenue Act of 1928 do not apply to this case.

11. The court below erred in not holding that to the extent that Section 611 may be construed to limit the authority of the Commissioner of Internal Revenue to refund the tax illegally collected or the right of the petitioner to recover it, the section has been repealed and superseded by the later act of Congress, Section 3220 of the Revised Statutes, as amended.

12. The court below erred in not holding that, if construed to apply to this case in which the tax was collected after the enactment of Section 1106(a) of the Revenue Act of 1926, Section 611 of the Revenue Act of 1928 would be unconstitutional because in violation of the Fifth Amendment.

13. The court below erred in not holding that it was beyond the power of a subsequent Congress in the enactment of Section 612 of the Revenue Act of 1928 to repeal Section 1106(a) as of February 26, 1926, to defeat the right of the petitioner to recover the tax collected from it after the liability therefor had been extinguished.

VI.

Questions Presented.

1. Is the petitioner deprived of the right it would otherwise have to recover the amount illegally collected from it as a tax after the expiration of the statutory period for collection, because, after the expiration of the statutory period, it deposited with its bank $65,000.00 and the bank advised the collector that the amount had been deposited and that the bank was authorized to pay up to the amount "upon your final determination * * * and that said payment will be made to you upon your demand"?

2. The validity and effect of a waiver of the time for the collection of a tax given after the expiration of the statutory period for collection.

3. The validity and effect of a waiver of a statutory period for collection of a tax which has no application to the case.

4. The validity and effect of a waiver of "collection of the tax" which does not also provide for a "later determination, assessment, and collection of the tax" as required by Section 250(d) of the Revenue Act of 1921.

5. Are the provisions of Sections 607, 611 and 612 of the Revenue Act of 1928 to be construed to apply to deprive the petitioner of its right to recover the amount illegally collected from it as a tax after the enactment of Section 1106(a) of the Revenue Act of 1926?

6. If Section 611 otherwise can be construed to apply has it to that extent been repealed and superseded by the Act of May 29, 1928, c. 901, Sec. 3, 45 Stat. 996, a later act?

7. If Sections 611 and 612 are to be construed to apply would the petitioner be deprived of its property or would its property be taken in violation of the Fifth Amendment to the Constitution?

VII.

The Argument.

Summary of Argument.

A. The "liability for the tax" did not "still" exist, after the expiration of the statutory period for collection to defeat the right of the petitioner to recover the tax paid after the statute had run.

B. The deposit with the bank was made merely to insure the collection of the amount of the tax after the expiration of the period within which the collection legally could have been made, but which later collection the petitioner could not have resisted.

C. The petitioner gave no bond before the expiration of the statutory period for collection and there is no similarity between this case and that of *United States* v. *John Barth Company, supra.*

D. The letter from the bank to the collector does not constitute a waiver of the right of the petitioner to recover the amount of the tax collected from it after the expiration of the statute of limitations, because not a consent in writing of both the petitioner and the Commissioner of Internal Revenue as required by Section 250(d) of the Revenue Act of 1921.

E. The waiver was given after the expiration of the statutory period for collection and is therefore of no force and effect.

F. The waiver is of the limitation period defined in Section 278(d) of the Revenue Act of 1924 and has no application to the collection of the tax assessed in July, 1920.

G. The waiver is not sufficient to meet the requirements of Section 250(d) of the Revenue Act of 1921 because not a consent to a "later determination, assessment, and collection of the tax."

H. The provisions of Section 611 of the Revenue Act of 1928 do not apply:

1. The consent of the United States to be sued is given by Section 145 of the Judicial Code and not by Section 607 of the Revenue Act of 1928 and the case does not come within the provisions of Section 607 nor of the exception thereto in Section 611 of the same Act.

2. Section 611 is an administrative provision and is not to be construed to be retroactive.

3. Section 611 is not to be construed to apply to a case in which the tax was collected after the enactment of Section 1106(a) of the Revenue Act of 1926 and while the section was in force.

4. The collection of the tax was never stayed by the claim in abatement nor otherwise.

5. The tax was forcibly collected from the petitioner and payment was not voluntary as contemplated by Congress by the use of the word "payment."

I. To the extent that it might otherwise be construed to apply Section 611 has been repealed by Section 3220 of the Revised Statutes, a later act.

J. Section 611 of the Revenue Act of 1928 if construed to apply to this case, in which the tax was collected after the enactment of 1106(a) of the Revenue Act of 1926, would deprive the petitioner of its property without due process of law in violation of the Fifth Amendment.

K. It was beyond the power of a subsequent Congress in the enactment of Section 612 of the Revenue Act of 1928 to repeal Section 1106(a) as of February 26, 1926, to disturb the petitioner's right to recover a tax paid after the liability therefor had been extinguished by the bar of the statute of limitations.

POINT A.

THE "LIABILITY FOR THE TAX" DID NOT "STILL" EXIST, AFTER THE EXPIRATION OF THE STATUTORY PERIOD FOR COLLECTION, TO DEFEAT THE RIGHT OF THE PETITIONER TO RECOVER THE TAX PAID AFTER THE STATUTE HAD RUN.

In its opinion and as the basis of its decision the court below stated that "the liability for the tax still existed" after the expiration of the five-year period for collection defined in Section 250(d) of the Revenue Act of 1921. It is to be carefully noted that the court held that the thing that still existed is the liability "for the tax," not the duty to pay the tax after the running of the statute with the right to recover it, but the tax liability, the right and title thereto.

What the court below actually held is that a tax paid after the bar of the statute can not be recovered from the United States. The reasoning of the court is that the statute operates only to bar the remedy and does not extinguish the liability. This is the same principle that the court followed in *Toxaway Mills* v. *United States*, 61 Ct. Cl. 363, in which it misconstrued Section 250(d) of the Revenue Act of 1921 and completely ignored Sections 3224 and 3220 and 3226 of the Revised Statutes. The decision of the court below in the *Toxaway Mills* case was reversed on confession of error by the Solicitor General, 273 U. S. 781, 47 S. Ct. 471, and should not have been followed in this case.

The petitioner submits that on the expiration of the five-year period provided in Section 250(d) of the Revenue Act of 1921 the liability was extinguished. See Petitioner's Brief in *Percival E. Magee* v. *United States*, No. 65, October Term, 1930, pages 24 to 30. The tax was collected on June 8, 1926, and the attention of the court is called to Section 1106(a) of the Revenue Act of 1926, in which Congress provided that the bar of the statute of limitations shall extin-

guish the liability. This case involves a similar question to that involved in *Toxaway Mills* v. *United States, supra,* in which error was confessed. The decision below conflicts with the decisions of this Court in *Bowers* v. *New York & Albany Lighterage Company,* 273 U. S. 346, 47 S. Ct. 389; *Graham* v. *Dupont,* 262 U. S. 234, 43 S. Ct. 567, and *Russell* v. *United States,* 278 U. S. 181, 49 S. Ct. 121.

POINT B.

THE DEPOSIT WITH THE BANK WAS MADE MERELY TO INSURE THE COLLECTION OF THE AMOUNT OF THE TAX AFTER THE EXPIRATION OF THE PERIOD WITHIN WHICH THE COLLECTION LEGALLY COULD HAVE BEEN MADE, BUT WHICH LATER COLLECTION THE PETITIONER COULD NOT HAVE RESISTED.

The deposit was made merely to insure the collection of the tax after the running of the statute, which collection, however illegal, the petitioner could not have resisted.

The court below found that on September 18, 1925, the petitioner deposited with its bank the sum of $65,000.00, to insure payment of the amount of the tax assessed in July, 1920. In its findings the court referred to the deposit as one in escrow and further referred to the final determination of the tax. These findings are to some extent at least conclusions of law. The finding of fact that this Court should consider is that on October 10, 1925, the bank addressed a letter to the collector of internal revenue and stated that the deposit had been made and that the bank had been authorized by the petitioner to pay the collector up to the amount of $65,000.00, "upon your final determination of the amount due * * * and that said payment will be made to you upon your demand." This was communicated to the collector.

All that the petitioner intended to accomplish by the

deposit and all that the collector desired was simply to insure that collection of the amount of the tax might be made, which collection was at the time barred by the statute of limitations. Despite the running of the statute of limitations it was still within the power of the collector to proceed to make an illegal collection of the amount of the tax and all that the deposit was intended to accomplish was to satisfy the collector that he could actually obtain the amount at a later day. The petitioner was helpless to resist the illegal collection and the mere fact that it sought to defer the day of payment should not be held to prejudice it in asserting its right to the amount illegally collected. The purpose of the deposit was merely to insure the payment of the amount of the tax after the statute had run.

The deposit of the fund with the bank with instructions to pay the collector on demand should certainly have no greater effect than actual payment would have had. Had the tax been actually paid the petitioner could recover under the decisions of this Court in *Graham* v. *Dupont*, *supra*, and *Bowers* v. *New York & Albany Lighterage Company*, *supra*, if the provisions of Section 611 of the Revenue Act of 1928 are not to be construed to defeat such recovery.

That the petitioner and the collector of internal revenue did not intend the deposit to have any such effect as was given it by the court below clearly appears from the facts that on the following day the petitioner signed the consent in writing hereinafter referred to and that the collector never availed himself of the right to demand payment from the deposit but on the contrary elected to proceed against the petitioner and to collect the amount in controversy from the petitioner as a tax. The petitioner therefore submits that this Court should entirely disregard the fact that a deposit was made and should consider this case in the same light as *United States* v. *Wyman, Partridge & Company*, No. 416, October Term, 1930, and other cases in which the illegal collection of the amount of the tax was made after the enactment of Section 1106(a) of the Revenue Act of

1926. The collection was actually made from the petitioner as a tax and the only question that the case presents is the right of the petitioner to recover the amount of a tax collected from it after the expiration of the five-year period defined in Section 250(d) of the Revenue Act of 1921 and after the enactment of Section 1106(a) of the Revenue Act of 1926, and prior to the enactment of Sections 611 and 612 of the Revenue Act of 1928.

The collector never so much as recognized the deposit by acknowledgment or otherwise and the fact that he ignored it in making the collection is positive proof that he gave no consideration to it.

POINT C.

THE PETITIONER GAVE NO BOND BEFORE THE EXPIRATION OF THE STATUTORY PERIOD FOR COLLECTION AND THERE IS NO SIMILARITY BETWEEN THIS CASE AND THAT OF UNITED STATES V. JOHN BARTH COMPANY, SUPRA, FOLLOWED BY THE COURT BELOW.

The court below took the position that the decision of this Court in the case of *United States* v. *John Barth Company, supra,* is controlling here. The petitioner submits that there is no similarity between the two cases. This case is to be distinguished from the John Barth Company case for a number of reasons.

The first distinction between the two cases is that in the John Barth Company case the suit was brought by the United States against the John Barth Company and its bondsman for the enforcement of the conditions of the bond. This Court was there concerned merely with the force and effect of the provisions of the bond and the case was decided accordingly. In the present case no bond was ever given and the suit is not by the United States for the enforcement of a bond or for the enforcement of any agreement or con-

tract, but the suit is one brought by the petitioner to recover the amount of the tax illegally collected from it after the expiration of the limitation period for collection. The action in the John Barth Company case as clearly pointed out by Chief Justice Taft was based on and arose from the provisions and conditions of the bond. During the course of his opinion the Chief Justice stated:

> "* * * The making of the bond gives the United States a cause of action separate and distinct from an action to collect taxes which it already had. * * *"

In the present case there is no new cause of action separate and distinct from the right of the collector to collect a tax after the expiration of the statute of limitations. This case unlike the John Barth Company case involves merely the question of the effect of the statute of limitations and the cause of action is the right of the petitioner to recover a tax illegally collected. The action is based on Sections 3220 and 3226 of the Revised Statutes and not on a bond or a contract.

In the John Barth Company case the consideration for the giving of the bond was the postponement of the collection of the tax reported in the return. The bond was given in that case prior to the expiration of the statutory period for collection and "in consideration of the United States refraining from and suspending the collection of taxes thus outstanding against the Barth Company for the year 1918, pending consideration and adjudication of the foregoing claims for abatement, * * *." In the John Barth Company case the consideration clearly appears. In the present case the statute of limitations had run and the petitioner obtained no benefit from the mere postponement or delay of the illegal collection. The terms and conditions of the bond in that case were to pay any part of the tax found to be due on the subsequent determination of the Commissioner of Internal Revenue. In the present case there was

no contract or agreement whatever between the petitioner and the Commissioner of Internal Revenue nor between it and the collector of internal revenue. It is true that the letter from the petitioner's bank to the collector advised that the amount of the tax would be paid on demand but the petitioner is not privy thereto. There is in the letter no provision for consideration of the abatement claim by the Commissioner of Internal Revenue. The reference is merely to the collector and his determination and demand. There are in fact in the letter no provisions for delay, but a mere statement that payment would be made on demand. The letter was written solely to protect and for the benefit of the collector.

The most important distinction between the *John Barth Company* case and this case is that in that case "the bond was given well within the five years after the return" and, as the late Chief Justice pointed out, was a substitution for the obligation arising under the return to pay the tax. During the course of the opinion it is further stated:

> "In this case there was a return and there was an assessment, but *the bond was given well within the five years after the return*, and when the bond was given it required the obligees, if the abatement was not allowed, to pay interest from the time such tax would have been due, had no such claim been filed. In other words, *the limitation of Section 250(d) has no application to a situation following a claim of abatement and the giving of bond.*
>
> The plain *purpose of paragraph 14(a) was to effect a substitution for the obligation arising under the return* and assessment to pay the tax, of the contract entered into in the bond to pay any part of the tax found to be due upon the subsequent determination of the Commissioner, * * * To avoid the result usually ensuing from the return which he himself made, the taxpayer was permitted by a bond temporarily to postpone the collection and to substitute for his tax liability his contract under the bond. *The object of the bond was not only to prevent the immediate collection of the*

tax but also to prevent the running of time against the Government. The taxpayer has obtained his object by the use of the bond, and he should not object to making good the contract by which he obtained the delay he sought."

There is a further distinction between the two cases. In the John Barth Company case the bond was expressly authorized by Paragraph 14(a), Section 234(a) of the Revenue Act of 1918 (40 Stat. 1057). In the present case the deposit of the money with the bank was an act not authorized by statute and was in fact in violation of the provisions of the revenue acts that the collector should proceed to collect the amount of the tax without delay.

The petitioner submits that there is no similarity whatever between this case and that of *United States* v. *John Barth Company* and that the court below clearly erred in applying and following the decision of this Court in that case. The question here presented is the right of the petitioner to recover a tax collected from it after the expiration of the statute of limitations, and not the right of the United States to recover on a bond given as a substitute for the liability for the payment of the tax and as to which bond the limitation period for the collection of the tax has no application.

The John Barth Company case holds that the statute of limitations in Section 250(d) of the Revenue Act of 1921 has no application to "a situation following a claim of abatement and the giving of bond" to prevent the running of the statute of limitations. The same reasoning leads to the conclusion that where no bond was given or deposit made "to prevent the running of time against the Government" that the statute of limitations does apply. The petitioner submits therefore that the decision of this Court in the John Barth Company case supports its position rather than that taken by Judge Green in the court below.

The bond in the *John Barth Company* case was given by the taxpayer to obtain the benefit of the provision of Sec-

tion 234(a), 14(a) by way of reducing income and preventing the immediate collection of the tax. The consideration for the bond was the benefit to the taxpayer. In that case this Court held the taxpayer liable on the bond and according to its terms. The same rule should not apply where a bond is given or a deposit is made solely for the benefit of the United States or of the collector. In such cases the rule should be that the bond or deposit does not create a new liability but simply insures payment of the tax liability and that a suit by the taxpayer after payment of the tax should be looked on just as any other suit for the recovery of a tax illegally collected and no importance should be attached to the bond or the deposit. In this case the collector was concerned merely in getting the amount of the tax, legally or illegally. His concern was merely to obtain credit on his books to be applied against the assessment with which he was charged. The money was placed in the bank merely as collateral to insure payment. The deposit created no primary liability. The liability for the tax was still the liability imposed by the taxing statutes.

If this Court should hold that the rule announced in the *John Barth Company* case, an action to enforce a bond, should apply in all cases in which bonds were given to the United States or to the collectors or in which deposits were made, the result would be that those ameliatory provisions of the several revenue acts for the giving of a bond to insure payment would become dead letters. To avoid such result this Court should hold that the decision in the John Barth Company case is to be limited to a suit by the United States on a bond made to it by a taxpayer to obtain some benefit under the taxing statutes and as a substitute for his liability under those statutes.

The purpose that Congress intended to accomplish by providing for a bond to insure payment was merely to protect the United States by enabling it to obtain the amount demanded as a tax whether or not due. If the decision in the *John Barth Company* case is to be extended to apply to

this case the effect would be to interrupt the practice now in force of furnishing security for the payment of tax, whether or not due, with the right to later contest the correctness of the assessment or collection. There is no statement in the opinion of the late Chief Justice which can be construed to mean that he intended the decision to apply to any case except an action by the United States on a bond given "to prevent the immediate collection of the tax but also to prevent the running of time against the Government." The petitioner submits that the court below has erroneously interpreted the opinion in that case and the error should be corrected in order that the taxing statutes may be administered as clearly intended by Congress and in accordance with the interpretation uniformly given them by the Treasury Department, that the mere furnishing of collateral to insure payment should not defeat the right of the taxpayer to contest the legality of the collection of the tax.

POINT D.

THE LETTER FROM THE BANK TO THE COLLECTOR DOES NOT CONSTITUTE A WAIVER OF THE RIGHT OF THE PETITIONER TO RECOVER THE AMOUNT OF THE TAX COLLECTED FROM IT AFTER THE EXPIRATION OF THE STATUTE OF LIMITATIONS. BECAUSE NOT A CONSENT IN WRITING OF BOTH THE PETITIONER AND THE COMMISSIONER OF INTERNAL REVENUE AS REQUIRED BY SECTION 250(d) OF THE REVENUE ACT OF 1921.

The holding of the court below that "the collection was not made on the ground that the tax was due, but was based on a valid contract to pay a certain amount" is erroneous both in law and fact. It is in direct conflict with the provisions of Section 250(d) of the Revenue Act of 1921 which require the consent in writing of both petitioner and the

Commissioner of Internal Revenue to a later determination, assessment and collection of the tax. The decision is erroneous in fact because it conflicts with the special finding that collection was made, not from the bank and on the basis of the letter, but from the petitioner as a tax. The collector ignored the letter and elected to make the collection from the petitioner.

POINT E.

THE WAIVER WAS GIVEN AFTER THE EXPIRATION OF THE STATUTORY PERIOD FOR COLLECTION AND IS THEREFORE OF NO FORCE AND EFFECT.

On the expiration of the five-year period defined in Section 250(d) of the Revenue Act of 1921 and at the time the waiver here under consideration was given on September 19, 1925, the liability for the tax had been extinguished by the expiration of the five-year period defined Section 250(d) of the Revenue Act of 1921, and as stated by this Court in *Russell* v. *United States, supra*, the petitioner was free from liability. The tax having been extinguished and the petitioner being free from liability, to give force and effect to the waiver would be to hold that by their consent the petitioner and the Commissioner of Internal Revenue could impose a tax for the first time or could recreate a liability for a tax after it had been extinguished.

This question is before this Court in *Stange* v. *United States*, S. Ct. No. 23, October Term, 1930, and other related cases, which are to be heard with it and counsel asks leave to refer to briefs filed on behalf of petitioners therein.

A question similar to the one here under consideration came before the Court of Appeals of the District of Columbia in *Joy Floral Company* v. *Commissioner of Internal Revenue*, 29 F. (2d) 865, in which the court held that the bar of the statute of limitations could not be effectively waived by a consent filed after a lapse of the five-year period. In the course of its opinion the court stated:

> "It is unreasonable to believe that Congress felt it necessary to provide a remedy whereby taxpayers may restore to the Commissioner the right to assess income taxes upon their returns after the statute of limitations has deprived the Commissioner of authority to make any assessment thereon. * * *"

In *Pictorial Printing Company* v. *Commissioner*, 38 F. (2d) 563, the Circuit Court of Appeals for the Seventh Circuit stated:

> "Concededly, the right to take proceedings for the determination, assessment, and collection of appellant's 1916 tax terminated February 28, 1922, and when, a year and a half thereafter, the revenue officers appeared at appellant's place of business to investigate that return, *there was no longer any right to institute any proceedings looking to the determination, levy, or collection of any further tax for that year.*"
>
> "When the revenue officer then presented the waiver or consent for signature, *the taxpayer had no liability on account of the tax for 1916,* * * *."

The petitioner submits that on the expiration of the five-year period defined in Section 250(d) of the Revenue Act of 1921 the liability for the tax was extinguished and the waiver obtained from the petitioner after the extinguishment of such liability is of no force and effect because it is beyond the power of the petitioner and the Commissioner of Internal Revenue to either create or recreate a liability for a tax. The liability for a tax can be created only by an act of Congress and the voluntary act of the parties is without force and effect.

In the case of *Percival E. Magee* v. *United States, supra,* beginning at page 24 of the brief counsel for petitioner has endeavored to set forth reasons which disclose that on the expiration of the five-year period defined in Section 250(d) the liability for the tax was extinguished. Counsel there pointed out that the provisions of Section 250(d) do not provide an ordinary statute of limitations affecting the rem-

edy of the collector, for the collector can still proceed to collect and distrain if necessary. The collector's remedy is full and complete and unaffected by the running of the statute because Section 3224 of the Revised Statutes prohibits injunction of collection. If the provisions of Section 250(d) do not affect the remedy they must affect the right.

POINT F.

THE WAIVER IS OF THE LIMITATION PERIOD DEFINED IN SECTION 278(d) OF THE REVENUE ACT OF 1924 AND HAS NO APPLICATION TO THE COLLECTION OF THE TAX ASSESSED IN JULY, 1920.

The consent in writing that was signed by the petitioner and the Commissioner of Internal Revenue refers to and incorporates Section 278(d) of the Revenue Act of 1924 which reads in part:

> "Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax."

This Court held in the case of *Russell* v. *United States*, *supra*, that the applicable period of limitation for the collection of a tax assessed prior to June 2, 1924, is that defined in Section 250(d) of the Revenue Act of 1921 and not the limitation period defined in Section 278(d) of the Revenue Act of 1924. What has occurred in this case is, therefore, that the parties have consented in writing to extend the time defined in a statute of limitations which has no application to the collection of the additional tax assessed during the month of July, 1920. The reason the consent was written to refer to the Revenue Act of 1924 is best explained by calling attention to the fact that prior to the decision of this Court in the case of *Russell* v. *United States*,

supra, the Commissioner of Internal Revenue believed that the provisions of Section 278(d) of the Revenue Act of 1924 applied to all assessments regardless of the time made. In this connection attention is called to Article 1272 of Regulations 65, promulgated for the enforcement of the Revenue Act of 1924 and in which reference is made to the tax imposed by the Revenue Act of 1921 and prior revenue acts, and in which reference is also made to the period for collection defined in Section 250(d) of the Revenue Act of 1921. The regulations read in part:

> "Period of limitation upon collection of tax.—In the case of the tax imposed by * * * the Revenue Act of 1918, or by any such Act as amended, a proceeding in court for the collection thereof must be begun within five years after the return was filed. The tax imposed by the Acts enumerated may be collected by a proceeding in court within the period prescribed whether it has or has not been assessed.
>
> Exceptions to the periods of limitations outlined in the preceding paragraph are prescribed in the following cases:
>
> (1) If the tax imposed by the Acts enumerated above has been assessed within the four-year period or the five-year period as required by section 277(a) of the statute a proceeding in court or distraint for the collection of such tax may be begun within six years after the assessment thereof."

At the time the petitioner and the Commissioner of Internal Revenue signed the consent in writing the Commissioner believed that the period of limitation defined in Section 278(d) of the Revenue Act of 1924 was the applicable limitation period and laboring under this belief he drafted and caused to be printed the document which was signed by the petitioner.

After the expiration of the applicable five-year period defined in Section 250(d) of the Revenue Act of 1921 the Commissioner of Internal Revenue believed that he had the

full period of six years from the assessment of the tax, July, 1920, within which to make collection.

What has occurred is that the Commissioner of Internal Revenue laboring under a mistake of law requested and obtained from the petitioner a consent to the extension of a limitation period which has no application to the case. The question presented is the effect of a mistake of law. A mistake of law is one that can not be corrected. In *Utermehle* v. *Norment*, 197 U. S. 40, 56, 25 S. St. 291, the Court stated:

> "* * * We know of no case where mere ignorance of the law, standing alone, constitutes any excuse or defense against its enforcement. It would be impossible to administer the law if ignorance of its provisions were a defense thereto. There are cases, undoubtedly, where ignorance of the law, united with fraudulent conduct on the part of others, or mistakes of facts relating thereto, will be regarded as a defense, but there must be some element, other than a mere mistake of law, which will afford an excuse. * * * Allen v. Galloway, 30 Fed. 466, where Hammond, J., in reviewing the decisions of this court, says: 'Whatever rule may prevail elsewhere, there can be in the equity courts of the United States no relief from a mistake of law.' "

The petitioner submits that the consent in writing for the extension of the limitation period which has no application is of no force and effect and that the consent can not be reformed to correct a mistake of law and by making it read to refer to Section 250(d) of the Revenue Act of 1921.

POINT G.

THE WAIVER IS NOT SUFFICIENT TO MEET THE REQUIREMENTS OF SECTION 250(d) OF THE REVENUE ACT OF 1921 BECAUSE NOT A CONSENT TO A "LATER DETERMINATION, ASSESSMENT, AND COLLECTION OF THE TAX."

The waiver is of the time for beginning distraint or suit "for the collection of the tax." Section 250(d) of the Revenue Act of 1921 provides that no suit or proceeding shall be begun after five years from the filing of the return, "unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment and collection of the tax." The waiver in question is merely of the collection. It is not of the "determination, assessment, and collection" required by the statute.

The question here involved is before this Court in the case of *Stange* v. *United States, supra*, and related cases. Counsel asks leave to refer to briefs filed therein.

The petitioner submits that Section 250(d) of the Revenue Act of 1921 is to be construed according to its express terms to mean that the statute of limitations is not extended unless the consent is to a later determination, assessment and collection of the tax. The statute expressly provides that no suit or proceeding for the collection of the tax shall be begun after the expiration of the five years from the filing of the return unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment and collection. Congress has seen fit to provide a definite period of five years for the beginning of the suit or proceeding and has expressly provided as the only exception thereto a consent to the determination and assessment as well as to the collection of the tax. In order for the respondent to avail itself of the exception to the statute, it must show that the case comes within the express provisions of the exception. This court in *United States* v. *Merriam*, 263 U. S. 179, 44 S. Ct. 69, stated:

> "* * * But in the statutes levying taxes the literal meaning of the words employed is most important for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer."

The express terms of Section 250(d) have no uncertain meaning. The section expressly requires that the consent be to a later determination and assessment as well as to collection. In *United States* v. *Updike*, 281 U. S. 489, 50 S. Ct. 367, decided May 19, 1930, this Court stated:

> "It may be that the saving clause was not strictly necessary, but was inserted from excessive care to put the right of the taxpayer beyond dispute. In any event, we think this is the fair interpretation of the clause, and the one which must be accepted, especially in view of the rule which requires taxing acts, *including provisions of limitation embodied therein*, to be construed liberally in favor of the taxpayer. Bowers v. New York & Albany Co., 273 U. S. 346, 349."

In *Rock Island A. & L. R. R. Co.* v. *United States*, 254 U. S. 141, 41 S. Ct. 55, this Court stated:

> "* * * At all events *the words are there in the statute* and the regulations, and the Court is of the opinion that they mark the conditions of the claimant's right."

Had Congress intended the consent to be merely to the assessment or to the collection of the tax after the five-year period, it would have so provided and would have caused the statute to read, consent to assessment or collection just as it did in Section 906(e) of the Revenue Act of 1926. It may be that a consent to a later determination and assessment was not necessary, but this fact should not cause the Court to give the statute a construction in conflict with its express terms. The requirement of the statute is a waiver of determination and assessment as well as of collection and it is beyond the authority of the Commissioner of Internal Revenue to waive the express requirement and the courts are not authorized to read it out of the statute. In the case of *Lucas, Commissioner* v. *The Pilliod Lumber Company*, 281 U. S. 245, 50 S. Ct. 297, decided April 14,

1930, it was held that an unverified tax return was not sufficient to start the running of the statute of limitations although the return was otherwise sufficient. In the course of the opinion this Court stated:

> "* * * *No officer had power to substitute something else for the thing specified.* The return so long as it remained unverified by oath of proper corporate officers did not meet the plain requirements. The necessity for meticulous compliance by the taxpayer with all named conditions in order to secure the benefit of the limitation was distinctly pointed out in Florsheim Bros. etc. v. United States, supra."

The petitioner submits that Congress has seen fit to provide a period of limitation of five years for the beginning of a suit or proceeding for the collection of a tax and has further provided as the only exception thereto a consent to a later determination, assessment and collection and that in order for the respondent to avail itself of the benefit of the exception contained in the statute it must show that the express terms and provisions inserted by Congress have been complied with. The consent in writing filed in this case does not comply with the provisions of the exception in the statute and is therefore not sufficient to meet the requirements of the statute.

POINT H.

THE PROVISIONS OF SECTION 611 OF THE REVENUE ACT OF 1928 DO NOT APPLY.

The consent of The United States to be sued is given by Section 145 of the Judicial Code and not by Section 607 of the Revenue Act of 1928 and the case does not come within the provisions of Section 607 nor of the exception thereto in Section 611 of the same Act:

In the brief for petitioner in the case of *Percival E. Magee* v. *United States,* supra, counsel has taken the position that

Section 611 is merely an exception to Section 607 of the Revenue Act of 1928 and is one of the mandatory administrative provisions which make it the duty of the Commissioner of Internal Revenue to credit or refund an overpayment and that the section is not a limitation on the authority of the Commissioner under Section 3220 of the Revised Statutes to remit or pay back a tax illegally collected nor is Section 611 a limitation on the petitioner's right to sue. Argument in support of this position appears at pages 5 to 15 of the brief and counsel begs leave to refer thereto.

Section 611 does not withdraw the consent of The United States to be sued:

Congress has by Section 145 of the Judicial Code and Section 3226 of the Revised Statutes, neither of which was amended by the Revenue Act of 1928, given the consent of the United States to be sued by the petitioner in the Court of Claims and this consent has not been withdrawn by Congress in the enactment of Sections 607 and 611 of the Revenue Act of 1928. The question here involved is, therefore, not the right of Congress to withdraw the consent to the United States to be sued. If Section 611 is to be given the construction for which the respondent contends the question would be the right of Congress to provide that the United States should retain the property of the petitioner contrary to the provisions of the Fifth Amendment to the Constitution.

The position of the respondent is, however, that by the enactment of Sections 607, 611 and 612 of the Revenue Act of 1928, Congress has withdrawn the consent of the United States to be sued by the petitioner in the Court of Claims and that in doing so Congress was acting within the power vested in it as the legislative branch of the Government of the United States. In order for the respondent to be consistent it must necessarily take the same position with reference to the actions that have been brought against the several col-

lectors. It must also contend that the right to sue these collectors has been denied.

An action against the United States for the recovery of an amount illegally collected as a tax is for a money judgment to be satisfied from an appropriation made for the purpose. The parties are the claimant and the United States. No public officer has any interest therein and it is not necessary that any public officer certify the judgment for payment or direct that it be paid.

An action against a collector, such as brought in *Graham and Foster, copartners, etc.* v. *Goodcell*, No. 36, October Term, 1930, and *Daniel Reeves, Inc.* v. *Anderson*, No. 463, October Term, 1930, is purely personal between the plaintiffs therein and the collectors. *Sage* v. *United States*, 250 U. S. 33, 39 S. Ct. 415; *Smietakana* v. *Indiana Steel Co.*, 257 U. S. 1, 42 S. Ct. 1; *Conant* v. *Kinney*, 162 Fed. 581, affirmed 166 Fed. 720, certioari denied 214 U. S. 526, 29 S. Ct. 703. As stated by this Court in *Sage* v. *United States*, supra:

> "At the time the judgment is entered the United States is a stranger. Subsequently the discretionary action of officials may, or it may not, give the United States a practical interest in the amount of the judgment, as determining the amount of a claim against it, but the claim would arise from the subsequent official act, not from the judgment itself."

The petitioner submits that the consent of the United States to the bringing of an action against a collector is not necessary. The United States can neither consent nor refuse to consent to the bringing of the action for the simple reason that the United States is a stranger to it and is in no way interested in it.

It is the position of the petitioner that the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of *Graham & Foster* v. *Goodcell*, 35 F. (2d) 586, and the decision of the Circuit Court of Appeals for the Second Circuit in the case of *Daniel Reeves, Inc.* v. *Anderson*, decided

July 21, 1930, in so far that they hold that actions may not be maintained against the collectors because of the lack of the consent of the United States to be sued, are entirely erroneous and are based on a complete misunderstanding of the nature of the action and of the parties thereto. An action against a collector being a personal one between him and the plaintiff does not in any manner involve the United States. The United States is not a party, the collector can not be sued in an official capacity nor can a collector be sued for the act of his predecessor in office. The action is purely personal.

The United States becomes interested not at all in the suit nor in the issuance of a certificate of probable cause under Section 989 of the Revised Statutes unless and until the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, in the exercise of the authority and discretion conferred by Section 3220 of the Revised Statutes has certified or directed the payment of the judgment obtained against the collector. *Frerichs* v. *United States*, 21 Ct. Cl. 16, aff'd. 124 U. S. 315.

In *Clinton Iron & Steel Company* v. *Heiner*, 30 F. (2d) 542, the District Court for the Western District of Pennsylvania stated:

> "* * * the suit is not against the United States but a personal action against the Collector based upon his illegal collection. The United States is interested not at all until and except its proper executive officer, in the exercise of a discretion conferred upon him by statute, adopts the liability of the Collector as that of the United States. *Sage* v. *United States*, 250 U. S. 33."

In the enactment of Section 619(b) of the Revenue Act of 1928, by which Section 3220 of the Revised Statutes was amended to read in part "Except as otherwise provided by law, * * *" Congress placed a limitation on the authority and discretion of the Commissioner of Internal Revenue to repay to any collector or deputy collector the full amount

of such sums of money as may be recovered against him in any court and had Section 619(b) itself not been repealed the Commissioner of Internal Revenue would now have no authority to repay a collector the amount of a judgment rendered against him in a case in which an abatement claim had been filed and to which the provisions of Section 611 apply.

Congress was apparently aware of the fact that by the enactment of Section 619(b)it had complicated the administration of the tax laws and had placed a collector in the awkward position of being liable for a judgment against him personally which the Commissioner of Internal Revenue was prohibited from repaying. Under the circumstances it was necessary for Congress to repeal Section 619(b) and to re-enact Section 3220 of the Revised Statutes to give the Commissioner of Internal Revenue full and complete authority to repay a collector the amount of a judgment rendered against him with or without a certificate of probable cause.

The position of the respondent that the petitioner can not sue either the United States in the Court of Claims or the collector personally in a district court without the consent of Congress is unsound. Congress has no concern with an action against a collector in his personal capacity and it would be illogical to assume that Congress intended Section 611 to have any application to an action against a collector. That Congress has not attempted to withdraw the consent of the United States to be sued is too apparent for argument.

A far more tenable position for the respondent would be, as stated by the Ways and Mean Committee, that Section 611 "authorized the retention" of the amount illegally collected as a tax after the expiration of the statutory period therefor. By taking this position the respondent would present to the Court the only constitutional question that can arise in a suit against the United States.

The consent of the United States to be sued by the petitioner as given by Section 145 of the Judicial Code and Sec-

tion 3226 of the Revised Statutes still stands, and Congress has not in any way withdrawn the consent of the United States to be sued by any taxpayer for a tax "erroneously or illegally assessed or collected"—to quote from the latest expression of Congress on the subject in Section 3226 of the Revised Statutes. See Regulations 69 in Appendix.

Section 611 is an administrative provision and is not to be construed to be retroactive:

The Committee on Finance of the Senate, to which was referred H. R. 1, Internal Revenue Bill of 1928, 70th Congress, 1st Session, Report No. 960, pp. 17-18, "VIII. STRUCTURE OF NEW BILL AS COMPARED WITH PRIOR REVENUE ACTS", reported among other things:

> "Therefore, the provisions of the income tax title of the present bill apply only to the taxable year 1928 and succeeding years. They have no effect whatsoever on taxes imposed for prior taxable years, nor do the provisions of the 1926 income tax title have any effect on the computation of tax for 1928 or later years. For this reason the income tax title of the 1926 act is not repealed by the bill and remains in force for the *collection* of taxes for 1925, 1926, and 1927, as well as taxes under prior acts, except as modified by Title III of the present bill, containing express amendments to such title, and by Title IV, containing various administrative provisions, and by Title V, *containing a few retroactive provisions intended to relieve certain cases of hardship under prior acts.*
>
> It is planned ultimately to combine provisions of this general nature into a compilation or code apart from the revenue acts."

The Committee on Ways and Means of the House of Representatives, on the Revenue Bill of 1928, Report No. 2, pp. 11-12, "STRUCTURE OF NEW BILL AS COMPARED WITH PRIOR REVENUE ACTS," reported in part:

> "Therefore, the provisions of the income tax title of the present bill apply only to the taxable year 1927 and succeeding years, and have no effect whatsoever on taxes imposed for prior taxable years. For this reason the income tax title of the 1926 Act is not repealed by the bill and remains in force for the collection of taxes for 1925 and 1926, as well as taxes under prior Acts, except as modified by Title III of the present bill, containing express amendments to such title, and by Title IV containing various administrative provisions, and by Title V, containing a few retroactive provisions intended to relieve certain cases of hardship under prior acts."

At this juncture and in view of the importance of the possible effect of Section 611 of the Revenue Act of 1928, in conjunction with, or separate and apart from, such sections of the same Act as Sections 607, 608, 609 and 610, relating to the effect of the running of the statute of limitations, we here state that these Sections appear in Title IV containing various *administrative provisions,* and do not appear in "Title V containing a *few retroactive provisions* intended to relieve certain cases of hardship under prior acts," viz:

Section 702 entitled "Basis of Property upon Sale by Estate—*RETROACTIVE.*"

Section 703 entitled "Deduction of Estate and Inheritance Taxes—*RETROACTIVE.*"

Section 704 entitled "Taxability of Trusts as Corporations.—*RETROACTIVE.*"

Section 705 entitled "Installment Sales—*RETROACTIVE.*"

Section 706 entitled "Contributions to Charity—*RETROACTIVE.*"

Section 705(b) is as follows:

> "Nothing in this section shall be construed as in any manner modifying sections 607, 608, 609 or 610 of this chapter, relating to the effect of the running of the statute of limitations."

Section 716 of the Revenue Act of 1928 entitled "Effective Date of Act" reads:

> "Except as otherwise provided, this Act shall take effect upon its enactment." Approved May 29, 1928, 8:00 A. M.

"Section 611. Collections Stayed by Claim in Abatement."

As this Section, being Section 611 of c. 852, 45 Stat. of the Revenue Act of 1928, appears in Chapter 24, Title IV and in accordance with the provisions of Section 716, supra, it "*shall take effect upon its enactment,*" namely, May 29, 1928.

Section 611 is not to be construed to apply to a case in which the tax was collected after the enactment of Section 1106(a) of the Revenue Act of 1926 and while the section was in force:

By section 1106(a) of the Revenue Act of 1926 (44 Stat. 113) Congress provided that the bar of the statute of limitations against the United States in respect to the tax shall not only operate to bar the remedy but shall extinguish the liability. The liability for the amount of the tax here in question was, therefore, expressly extinguished by an Act of Congress on February 26, 1926, and the subsequent collection of the amount of the tax from the petitioner was unauthorized and illegal and was made at a time when no liability therefor existed. The lower courts have uniformly held that the amount of a tax collected after the liability therefor had been expressly extinguished by Section 1106(a) can be recovered from the United States and that the provisions of Section 611 of the Revenue Act of 1928 do not apply. *Wyman, Partridge & Company* v. *United States,* 41 F. (2d) 886, certiorari granted October 20, 1930, *Wettengel* v. *Robinson, et al.,* 300 Pa. 355, 150 Atl. 658, Supreme Court of Pennsylvania; *Diamond Alkali Company* v. *Heiner,* 39

F. (2d) 643; and *Clinton Iron & Steel Company* v. *Heiner*, 30 F. (2d) 542.

The question here involved is before this Court in *United States* v. *Wyman, Partridge & Company*, supra, and counsel begs leave to refer to the brief filed by the respondent therein.

The collection of the tax was never stayed:

The requirements of Section 611 are the assessment of the tax, the filing of the claim in abatement, "and if the collection of any part thereof was stayed, then, the payment of such part * * * shall not be considered an overpayment * * *." The section applies only in the case of stay and only to the extent of that part of the tax the collection of which "was stayed."

Congress has used the word "stayed" which is a word having a well defined and judicially settled legal meaning. The only meaning that the word can have is that the collector was stopped or prevented from collecting the tax. *United States* v. *Burden, Smith & Company*, 35 F. (2d) 229. In *Crooks* v. *Harrelson, et al.*, 35 F. (2d) 416, certiorari granted 50 S. Ct. 237, the Circuit Court of Appeals, Eighth Circuit, said:

> "* * * *in statutes levying taxes the literal meaning of the words employed is most important for such statutes are not to be extended by implication beyond the clear import of the language used.* If the words are doubtful the doubt must be resolved against the Government and in favor of the taxpayer. Gould v. Gould, 245 U. S. 151, 153, 38 S. Ct. 53, 62 L. Ed. 211.

The rule is stated by Lord Cairns in Partington v. Attorney-General, L. R. 4, H. L. 100, 122:

> 'I am not at all sure that in a case of this kind—a fiscal case—form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it

> is this: If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, can not bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute.' And see Eidman v. Martinez, 184 U. S. 578, 583 (22 S. Ct. 515, 46 L. Ed. 697.)"

In *William F. Taubel, Inc.* v. *Sturges,* decided November 8, 1930, District Court of New Jersey, it is stated:

> "A reasonable view to take concerning the meaning of the word 'stay' is; that it connotes a state of facts either under rules and regulations or under stipulations made pursuant thereto which would in effect restrain the collector from making collection pending the decision of a claim."

In this case the return was filed in August, 1919, and the first abatement claim was filed in December, 1919, and the second during the month of July, 1920. These claims were allowed for $19,053.70 and rejected for $32,135.24 but the record is silent as to the date of rejection. After the filing of the claim in abatement in July, 1920, no effort was made by the collector to collect the tax until May 28, 1926, almost six years after the claim in abatement was filed. The demand made on May 28, 1926, was promptly followed by payment within ten days. There appears in the record absolutely nothing to disclose that the collection was stayed or even so much as delayed by the filing of the abatement claim and there is nothing to disclose that the collector could not have made collection at any time that he so desired. On the contrary the record clearly discloses that all demands of the collector were promptly complied with and that all negli-

gence or delay was his. Further the record is silent as to the provisions or the bases of the claims in abatement. The findings of the court below disclose simply that the claims in abatement were filed and allowed in part by the Commissioner.

In briefs filed in *Magee* v. *United States*, supra, and in *Oak Worsted Mills* v. *United States*, S. Ct. No. 104, October Term, 1930, counsel have taken the position that the mere filing of a claim in abatement does not stay the collection of the tax for the simple reason that there is nothing to prevent the collector's proceeding to make the collection at any time that he so desires. In addition to what is said in briefs in the cases referred to counsel desires to call attention to Article 1272 of Regulations 65, supra, which when read with Article 261 of Regulations 33 and Article 1032 of Regulations 62 discloses, that collection was held up, not because of the filing of the claim in abatement, which the Regulations prescribe shall not suspend the collection of the tax, but because the Commissioner of Internal Revenue and the collector construed Section 278(d) of the Revenue Act of 1924 to mean that the collector had the full period of six years from the assessment of the tax in July, 1920, in which to make collection. The Commissioner's misunderstanding clearly appears in Article 1272 of Regulations 65 and further appears from the fact that in this case, he actually so interpreted Section 278(d) of the Revenue Act of 1924 and obtained a waiver from the petitioner in which specific reference is made to that section of the Revenue Act of 1924.

All that has occurred in this case is that the Commissioner of Internal Revenue and the collector of internal revenue labored under the impression that the period of limitation for the collection did not expire until August, 1926, and they thought that they were fully protected by the waiver obtained to expire December 31, 1926. It was not until the decision of this Court in the case of *Russell* v. *United States*, supra, that the Commissioner of Internal Revenue became aware of his error.

The petitioner submits that collection in this case was not stayed nor even delayed because of the filing of the abatement claims but because of the Commissioner's misunderstanding of the provisions of the revenue acts and because of his erroneous belief that he had until August, 1926, in which to make collection. Whether the claims in abatement were rejected during the year 1920 or during the year 1926 does not appear in the findings of fact but the Court will note that the Commissioner of Internal Revenue had from the time of the filing of the last claim in abatement the full period of four years before the expiration of the statute of limitations within which to act on it and to collect the amount for which he rejected it.

The question of stay is one of fact and the burden is on the respondent to disclose that collection was in fact stayed beyond the limitation period for collection. In this case there is nothing in the record to support the position of the respondent and the respondent has not borne the burden of proving stay. The mere fact that the claims in abatement were filed, standing alone and in the absence of proof that they were under consideration by the Commissioner of Internal Revenue until after the expiration of the statute of limitations, is not sufficient to make out a case for the respondent under Section 611 of the Revenue Act of 1928.

The tax was forcibly collected from the petitioner and payment was not voluntary as contemplated by Congress by the use of the word "payment":

In support of its position that Section 611 is to be construed to apply to voluntary payments only counsel begs leave to refer to brief of petitioner in *American Glue Company* v. *United States*, S. Ct. No. 519, October Term, 1930.

POINT I.

TO THE EXTENT THAT IT MIGHT OTHERWISE BE CONSTRUED TO APPLY SECTION 611 HAS BEEN REPEALED BY SECTION 3220 OF THE REVISED STATUTES, A LATER ACT. SECTION 619(b) HAS BEEN REPEALED IN ITS ENTIRETY.

In the brief for the petitioner in the case of *Percival E. Magee* v. *United States*, supra, counsel called attention to the re-enactment of Section 3220 of the Revised Statutes and to the fact that, in so far as Section 611 of the Revenue Act of 1928 might otherwise be construed to limit the authority of the Commissioner of Internal Revenue to make a refund of a tax illegally collected or of the right of the petitioner to obtain such refund, Section 611 of the Revenue Act of 1928 has been repealed and superseded by Section 3220 of the Revised Statutes, as amended by Act of May 29, 1928, c. 901, sec. 3, 45 Stat. 996, a later act. In the brief in that case counsel also called attention to the errors in the United States Code, Supplement III, Title 26, Sec. 149, and to the further fact that in Regulations 74 promulgated for the enforcement of the Revenue Act of 1928, the Treasury Department for the first time in the promulgation of any of the regulations for the enforcement of a revenue act, made no reference to Section 3220 of the Revised Statutes other than to quote Section 619(b), 45 Stat. 878, of the Revenue Act of 1928, which had however been repealed in its entirety by Section 3220 of the Revised Statutes as amended.

Since filing the brief in the *Magee* case counsel's attention has been called to United States Code Annotated, Pamphlet Supplement Cumulative, Acts of 70th Congress, First Session, with annotations to July 1, 1928, published by West Publishing Company and Edward Thompson Company, in which Section 3220 of the Revised Statutes, as amended May 29, 1928, c. 901, Sec. 3, 45 Stat. 996, is printed as enacted by the later act and as set forth at page 22 of petitioner's brief in Magee case. Following Section 3220 of the Revised

Statutes, as amended, there appears in the pamphlet the following annotation:

> "This section (section 3220 of the Revised Statutes, as amended by section 1111 of the Revenue Act of 1926), was also amended by Act May 29, 1928, 8:00 a. m. c. 852, 619(b), 45 Stat. ——, by striking out 'Except as otherwise provided in sections 284 and 319 of the Revenue Act of 1926' and inserting in lieu thereof 'Except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes."

In the pamphlet the latest act of Congress is correctly set forth and with the proper explanation in the annotation. In the supplement to the Code which was later published, there was erroneously included Section 3220 of the Revised Statutes as it had been formerly amended by Section 619(b) of the Revenue Act of 1928.

The decisions of the Circuit Courts of Appeals in Huntley v. Gile & Jenks, etc.; Daniel Reeves, Inc., v. Anderson; and Wright and Taylor, Inc., v. Lucas:

In the case of *Huntley* v. *Gile & Jenks*, etc., 32 F. (2d) 857, followed in *Graham and Foster* v. *Goodcell*, supra, the Circuit Court of Appeals for the Ninth Circuit with reference to Section 611, stated:

> "While textually Section 611 is open to construction upon the whole we are left in no doubt that by it Congress intended to withhold from the taxpayer the right to have *refunded* money paid by him in the discharge of a valid tax. * * *"

The court avoided making any reference to Section 619(b) of the Revenue Act of 1928 and was apparently unaware of that fact that Section 3220 of the Revised Statutes had been amended and re-enacted subsequently to the enactment of the Revenue Act of 1928 and that Section 619(b) of the

Revenue Act of 1928 was thereby repealed in its entirety and that Section 611 to the extent that it might otherwise have had any bearing on the right of the appellant to the refund had also been repealed. Certainly the court would not have reached the conclusion that Congress intended to withhold from a taxpayer the right to a refund had its attention been called to the fact that Congress had in a statute, later than Section 611, expressly authorized the Commissioner of Internal Revenue to make such refund.

In the case of *Daniel Reeves, Inc.* v. *Anderson,* decided July 21, 1930, supra, Judge L. Hand of the Second Circuit likewise avoided any reference to Section 619(b) of the Revenue Act of 1928 or to Section 3220 of the Revised Statutes and reached the conclusion, in direct conflict with the express provisions of Section 3220 of the Revised Statutes, that the Commissioner of Internal Revenue was prohibited from making the refund and held that for that reason suit could not be entertained. The attention of the learned Judge was apparently not called to the fact that Section 3220 had been amended and re-enacted.

The reasoning of the court that Section 611 forbids the making of a refund by the Commissioner of Internal Revenue and must also be construed to forbid a suit to recover a tax illegally collected, is entirely erroneous and all logic in support of it fails when it is considered that Section 3220 of the Revised Statutes, as amended by the Act of May 29, 1928, c. 901, Sec. 3, 45 Stat. 996, a later enactment, restores to the Commissioner of Internal Revenue the full and complete authority which was by any possibility taken from him by Sections 611 and 619(b) of the Revenue Act of 1928.

In *Wright and Taylor, Inc.* v. *Lucas,* decided November 10, 1930, by the Circuit Court of Appeals for the Sixth Circuit the case of *Daniel Reeves, Inc.* v. *Anderson,* supra, was followed and the court likewise gave no consideration to the fact that Section 3220 of the Revised Statutes had been amended and re-enacted by the Act of May 29, 1928, c. 901,

Sec. 3, 45 Stat. 996, and during the course of its opinion the court stated:

> "It (Section 611) was intended to cut off any claim for the refund of such taxes at its very roots."

In the cases referred to the attention of the courts was apparently not called to the provisions of Section 619(b) of the Revenue Act of 1928, which are however, closely related to those of Sections 611 and 612 and further the attention of the courts was not called to the fact that Section 3220 of the Revised Statutes had been reenacted and amended subsequently to the enactment of the Revenue Act of 1928 and that Section 619(b) of the Revenue Act was thereby repealed in its entirety and that the provisions of Section 611, in so far as they might otherwise have any bearing on the authority of the Commissioner of Internal Revenue to refund or to pay back a tax illegally collected, were likewise repealed. The petitioner submits that the decisions of these courts are not based on the provisions of the latest act of Congress and should therefore be given no weight by this Court when it comes to consider the provisions of Sections 607, 611, 612 and 619(b) of the Revenue Act of 1928 and of Section 3220 of the Revised Statutes as amended by the Act of May 29, 1928, c. 901 Sec. 3, 45 Stat. 996.

POINTS J AND K.

SECTION 611 OF THE REVENUE ACT OF 1928 IF CONSTRUED TO APPLY TO THIS CASE, IN WHICH THE TAX WAS COLLECTED AFTER THE ENACTMENT OF 1106(a) OF THE REVENUE ACT OF 1926, WOULD DEPRIVE THE PETITIONER OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH AMENDMENT.

AND

IT WAS BEYOND THE POWER OF A SUBSEQUENT CONGRESS IN THE ENACTMENT OF SECTION 612 OF THE REVENUE ACT OF 1928 TO REPEAL SECTION 1106(a) AS OF FEBRUARY 26, 1926, TO DISTURB THE PETITIONER'S RIGHT TO RECOVER A TAX PAID AFTER THE LIABILITY THEREFOR HAD BEEN EXTINGUISHED BY THE BAR OF THE STATUTE OF LIMITATIONS.

The petitioner's return was filed in August, 1919, and the assessment of the additional tax, which was later illegally collected from the petitioner, was made during the month of July, 1920. The applicable period of limitation under the decision of this Court in the case of *Russell* v. *United States*, supra, is therefore the five-year period defined in Section 250(d) of the Revenue Act of 1921. This period expired in August, 1929. The additional tax was collected from the petitioner on June 8, 1926, and after the enactment of the Revenue Act of 1926. Section 1106(a) of the Revenue Act of 1926 as applicable here reads as follows:

> "The bar of the statute of limitations against the United States in respect to any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. * * *"

The occasion for the enactment of Section 1106(a) was the decision of the Court of Claims in the case of *Toraway Mills* v. *United States, supra*, and the intent of Congress was to prevent the decision of the Court of Claims from becoming a precedent. The purpose of the enactment was declared in Conference Report on the revenue bill of 1926, House Report No. 356, page 55, 69th Congress, First Session, as follows:

> "This amendment provides that the bar of the statute of limitations against the United States and against the taxpayer shall operate to bar the remedy and also extinguish the liability."

The bar of the statute of limitations referred to in Section 1106(a) of the Revenue Act of 1926 is, as applied to this case, that contained in Section 250(d) of the Revenue Act of 1921.

At the time the additional tax here in question was collected Section 1106(a) was in force and the tax was collected after the liability had been extinguished and after the tax had ceased to exist. The petitioner therefore submits that to construe Section 611 of the Revenue Act of 1928 to apply to this case would cause it to violate the provisions of the Fifth Amendment to the Constitution and would amount to the deprivation of property without due process of law and to the taking of property without compensation. The liability for the tax having been extinguished the amount of the tax thereby became the property of the petitioner and the collection of the amount from it amounted to the deprivation of property without due process of law and to the taking of property without compensation.

By Section 612 of the Revenue Act of 1928, Congress provided:

> "Section 1106(a) of the Revenue Act of 1926 is repealed as of February 26, 1926."

The petitioner submits that it was beyond the power of a subsequent Congress to repeal Section 1106(a) as of February 26, 1926, to defeat the right of the petitioner to recover the amount of the tax illegally collected from it after the liability therefor had been extinguished by the bar of the statute of limitations. The position of the petitioner has been sustained by the decisions of all of the lower courts which have passed on the question. These decisions are *Dobbins* v. *Commissioner*, 31 F. (2d) 935,

Third Circuit; *United States* v. *John Barth Company*, 27 F. (2d) 782, reversed on other grounds, 279 U. S. 370, 49 S. Ct. 366, Seventh Circuit; *Wyman, Partridge & Company* v. *United States, supra*, Court of Claims, certiorari granted October 20, 1930; *Wettengel* v. *Robinson et al., supra*, Supreme Court of Pennsylvania for the Western District; *Pepsin Syrup Company* v. *Schwaner*, 35 F. (2d) 197, District Court of Illinois; *Diamond Alkali Company* v. *Heiner, supra, and Peerless Woolen Mills* v. *Commissioner*, 13 B. T. A. 1119.

Section 1106(a) of the Revenue Act of 1926 and 612 of the Revenue Act of 1928 came under the consideration of the Supreme Court of Pennsylvania for the Western District in *Wettengel* v. *Robinson et al., supra*, trustees in a suit in equity to collect income taxes from the statutory liquidators of the corporation. In the course of its opinion the court made the following statement with reference to the constitutionality of Section 612 of the Revenue Act of 1928:

> "* * * the Government points to section 612 of the Revenue Act of May 29, 1928, which provides that 'Section 1106(a) of the Revenue Act of 1926, is repealed as of February 26, 1926,' that is, as of the date of its passage. Undoubtedly that provision would be effective as to all taxes the liability for which had not been extinguished prior to the passage of the Act of 1928, but would it as to those where it had? The court below, relying on *Dobbins* v. *Commissioner of Internal Revenue*, 31 Fed. (2d) 935, decided it would not. In construing section 612, it was there said that it 'did not revive a dead liability or create a new obligation.' The same conclusion was reached in *United States* v. *John Barth Co.*, 27 Fed. (2d) 782; *Erie Coal & Coke Co.* v. *Heiner*, 33 Fed. (2d) 135, and *Pepsin Syrup Co.* v. *Schwaner*, 35 Fed. (2d) 197. True, the first of these cases was reversed in *United States* v. *John Barth Co.*, 279 U. S. 370, but the Supereme Court expressly refused to pass upon the Government's con-

tention that the Act of 1928 'restores and gives life to the tax retrospectively.' A search fails to disclose any opinion by the Supreme Court of the United States, or by any federal Circuit Court of Appeals, which reaches a different conclusion from that of the court below. *Campbell* v. *Holt,* 115 U. S. 620, relied on by the Government, simply decides that a statute which limits the time within which suit may be brought, may be repealed, although in the particular case under consideration, the statutory limitation had run before the repealing statute was passed. Its effect as a precedent has been limited, however, to cases where the repealed statute was purely one of limitation. On this point see *William Danzer & Co.* v. *Gulf and Ship Island R. R. Co.,* 268 U. S. 633, where *Campbell* v. *Holt* is distinguished, and it is held that if a statute both creates the liability and limits the time within which suit may be brought, the limitation cannot be repealed after the right to sue has been lost, because (page 637) the 'effect would be to deprive defendant of its property without due process of law in contravention of the Fifth Amendment.' "

This Court in the case of *De Lima* v. *Bidwell,* 182 U. S. 199, speaking through Mr. Justice Brown, said:

"* * * *the right to recover the money sued for could not be taken away by a subsequent act of Congress.*

Plaintiffs sue in assumpsit for money which the Collector has in his hand, justly and equitably belonging to them. To say that Congress could by a subsequent act deprive them of the right to prosecute this action, would be beyond its power. * * *"

CONCLUSION.

In conclusion the petitioner submits

1. The deposit with the bank was made merely to insure the illegal collection of the amount of the tax after the expiration of the statutory period and gave rise to no pri-

mary liability and this case should be decided on the basis of the applicable provisions of the revenue acts and not on the basis of any supposed conditions or provisions in an agreement between the petitioner and the collector or between the bank and the collector.

2. The consent in writing having been given after the expiration of the five-year period for collection and after the liability for the tax had been extinguished is of no force and effect.

3. The consent in writing was for the extension of a statutory period for collection which has no application and was entered into under a mistake of law and is therefore of no force and effect and can not be corrected or reformed to refer to the proper limitation period.

4. The consent in writing is not sufficient to meet the requirements of Section 250(d) of the Revenue Act of 1921 because not a consent to a "later determination, assessment, and collection of the tax."

5. The provisions of Section 611 of the Revenue Act of 1928 have no application because the petitioner filed its claim for refund under Section 3220 of the Revised Statutes and brought suit under Section 145 of the Judicial Code and 3226 of the Revised Statutes and not under Section 607 of the Revenue Act of 1928. Further, the provisions of Section 611 do not apply because the collection of no part of the tax was "stayed."

6. To the extent that it might otherwise be construed to limit the authority of the Commissioner of Internal Revenue to remit or pay back the amount of the tax illegally collected or to in anywise affect the right of the petitioner to its recovery, Section 611 has been repealed and superseded by the later Act of Congress in Section 3220 of the Revised Statutes, as amended by Act of May 29, 1928, c. 901, Sec. 3, 45 Stat. 996.

7. Section 611 of the Revenue Act of 1928 if construed to apply to this case in which the tax was collected after

the enactment of Section 1106(a) of the Revenue Act of 1926 would deprive the petitioner of its property without due process of law in violation of the Fifth Amendment to the Constitution.

8. It was beyond the power of the subsequent Congress in the enactment of Section 612 of the Revenue Act of 1928 to repeal Section 1106(a) of the Revenue Act of 1926 as of February 26, 1926, to disturb the petitioner's right to recover a tax paid after the liability therefor had been extinguished by the bar of the statute of limitations.

Respectfully submitted,

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APPENDIX

The position of the petitioner that the right to sue the United States is conferred by Section 145 of the Judicial Code and Section 3226 of the Revised Statutes is fully supported by the Regulations of the Commissioner of Internal Revenue promulgated for the enforcement of Section 3226, as last amended by the Revenue Act of 1926. Article 1351 of Regulations 69, which is substantially the same as Article 1351 of Regulations 64, reads as applicable here:

> "Section 3226 of the Revised Statutes, as amended, *outlines the only manner in which a suit may be brought* by any person for the recovery of taxes erroneously or illegally assessed or collected or penalties collected without authority, or any sums excessive or in any manner erroneously collected, and strict compliance with these provisions by any person bringing such suit or proceeding is required. * * *"